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INSURANCE DEPARTMENT

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ADMIN HEARINGS OFFICE

BEFORE THE INSURANCE COMMISSIONER
OF THE
COMMONWEALTH OF PENNSYLVANIA

IN RE: : ALLEGED VIOLATIONS:
: :
William Marshall : 40 P.S. §§ 310.11(1), (14) and (20)
9632 South Colfax Avenue : :
Chicago, IL 60617-4940 : :
: :
Respondent : Docket No. SC16-03-004

ADJUDICATION AND ORDER

AND NOW, this 28th day of April, 2016, Teresa D. Miller, Insurance Commissioner of the Commonwealth of Pennsylvania ("Commissioner"), makes the following Adjudication and Order.

HISTORY

This case began when the Pennsylvania Insurance Department ("Department") filed its March 7, 2016 Order to Show Cause ("OTSC") directed to William Marshall ("the respondent"). The OTSC alleged that the respondent violated the Insurance Department Act.¹ Specifically, the OTSC alleged that the respondent, a non-resident licensed insurance producer, denied ever having been convicted of a felony even though he had pled guilty to one felony in 1987 and to another in 1992.

The OTSC advised the respondent to file an answer in accordance with applicable regulations (1 Pa. Code § 35.37), and further advised him that the answer must

¹ Act of May 17, 1921, P.L. 789, No 285 *as amended through* the Act of June 25, 1997, P.L. 349, No. 40, *repealed and partially reenacted by* the Act of December 3, 2002, P.L. 1183, No. 147. (40 P.S. §§ 310.1 *et. seq.*).

DATE MAILED: April 28, 2016

specifically admit or deny each of the factual allegations made in the OTSC. The respondent was advised to set forth the facts and state concisely the matters of law upon which he relies. He further was advised of the consequences of failing to answer the OTSC. Following the filing of the OTSC, a presiding officer was appointed and the appointment order was served on the respondent by certified mail to the same address to which the Department had mailed both the OTSC and motion for default judgment. The respondent accepted receipt of the appointment order on March 18, 2016.

The respondent failed to answer the Department's OTSC or otherwise respond to the Administrative Hearings Office. On April 1, 2016, the Department filed a motion for default judgment and served the respondent in accordance with 1 Pa. Code Chapter 33. The motion declared that the OTSC was sent by certified and first class mail to the respondent to his last known home address as kept on file in the Department. [OTSC ¶¶ 6 and 10]. The first class mailing was not returned as undeliverable.² [OTSC ¶ 10]. The respondent has not filed a response to the OTSC or motion for default judgment, nor made any other filing in this matter.

This adjudication addresses both the motion for default judgment and the OTSC. Factual findings and some legal conclusions are contained within the body of this adjudication.

DISCUSSION

This adjudication is issued without scheduling an evidentiary hearing, since the

² In its motion the Department also asserts that the OTSC sent by certified mail "was not returned." [Motion for Default Judgment ¶ 6]. It is unclear if the Department meant that the return receipt card was not received or if it received notice that the mailing was unclaimed. However, it is presumed that the respondent received the OTSC because the first class mailing was not returned as undeliverable, and because he signed a return receipt card for the Administrative Hearings Office certified mailing sent to the same address used by the Department in its OTSC and motion for default judgment.

respondent failed to answer the OTSC or motion for default judgment. The OTSC and motion advised as to the consequences of the failure to respond.³ However, because of the language in the penalty provisions of applicable statutes, this adjudication includes an analysis of an agency's authority for imposing penalties without an evidentiary hearing.

There are no factual disputes in the present matter to be addressed in a hearing. All factual averments in the OTSC are deemed to be admitted under 1 Pa. Code § 35.37.

Under general rules of administrative procedure, a final order may be entered without hearing for an insufficient answer to the OTSC unless otherwise provided by statute. *See* 1 Pa. Code § 35.37 ("Mere general denials . . . will not be considered as complying with this section and may be deemed a basis for entry of a final order without hearing, unless otherwise required by statute, on the ground that the response has raised no issues requiring a hearing or further proceedings."). A respondent failing to file an answer within the time allowed shall be deemed in default. *Id.* Department regulations do not limit the Commissioner's ability to order a default judgment without a hearing, so any limitation must come, if at all, from a statute.

In order for an adjudication by a Commonwealth agency to be valid, a party must have a "reasonable notice of a hearing and an opportunity to be heard." 2 Pa.C.S. § 504 (Administrative Agency Law). Similarly, the statute specifically applicable to the present case⁴ provides for a hearing procedure prior to certain penalties being imposed by the Commissioner. *See* 40 P.S. § 310.91.⁵ However, given that the respondent has not

³ The OTSC warned the respondent that failure to answer in writing would result in the factual allegations being deemed admitted and that the Commissioner could enter an order imposing penalties.

⁴ Insurance Department Act, Act of May 17, 1921, P.L. 789, No. 285 *as amended* by the Act of December 3, 2002, Act. No. 147 (40 P.S. §§ 310.1 *et seq.*).

⁵ The Insurance Department Act section mandates written notice of the nature of the alleged violations and requires that a hearing be fixed at least ten (10) days thereafter, and further provides that:

After the hearing or failure of the person to appear at the hearing, if a violation of this act is found, the

answered the OTSC and given current caselaw, these hearing procedures are inapplicable.

While no court has directly addressed the power of a Commissioner to enter a default judgment without hearing in a case under the Insurance Department Act, the caselaw supports such power. For example, in *United Healthcare Benefits Trust v. Insurance Commissioner*, 620 A.2d 81 (Pa. Cmwlth. 1993), the Court affirmed the Commissioner's grant of summary judgment for civil penalties despite the language contained in the applicable statutes which seemed to require a hearing.

In a case involving another agency, the Commonwealth Court upheld summary judgment imposing discipline issued by a commission despite the fact that the respondent had requested a hearing. *Kinniry v. Professional Standards and Practices Commission*, 678 A.2d 1230 (Pa. Cmwlth. 1996). In *Kinniry*, the applicable statute (24 P.S. §§ 2070.5(11), 2070.13) provided for a hearing procedure before discipline was imposed. However, the respondent's attorney merely requested a hearing without answering the specific factual averments in the charges against the respondent (which charges were treated as an OTSC). The Court upheld the summary judgment since deemed admission of the factual averments presented no factual issues to be resolved at hearing.

The Commissioner consistently has applied the reasoning of *United Healthcare* and similar cases when the respondent does not answer the OTSC and a motion for default judgment. See *In re Czmus*, SC09-05-009 (2009); *In re Kroope*, SC09-12-005 (2010); *In re Chappel*, SC14-10-024 (2015); *In re Ott*, SC15-11-002 (2016). The Commissioner adopts this reasoning in the present case: the important aspects of 2

commissioner may, in addition to any penalty which may be imposed by a court, impose any combination of the following deemed appropriate: . . .

40 P.S. § 310.91. This section then lists available penalties.

Pa.C.S. § 504 are notice and the *opportunity* to be heard. Default judgment is appropriate, despite language in applicable statutes which seems to require a hearing, when a respondent fails to take advantage of his opportunity to be heard. When a respondent in an enforcement action is served with an OTSC detailing the nature of the charges against him as well as the consequences of failing to respond, yet fails to answer the allegations or to answer a subsequent motion for default judgment, the Commissioner adopts the Commonwealth Court's reasoning that the respondent had an opportunity to be heard but has rejected the opportunity.

Additionally, since the factual allegations of the OTSC are deemed admitted, the determination by the Commissioner is a legal rather than a factual one. A hearing is not necessary for this type of determination. *See Mellinger v. Department of Community Affairs*, 533 A.2d 1119 (Pa. Cmwlth. 1987); *United Healthcare, supra*. The Commissioner adjudicates the present case based upon the undisputed, admitted facts as alleged in the OTSC.

The facts include that the respondent pled guilty and was convicted in 1987 of one felony count of robbery in Illinois and was sentenced to four years in prison. [OTSC ¶ 3; Appendix A]. In 1992, the respondent pled guilty to and was convicted of one felony count of unlawful use of a weapon by a felon in Illinois and sentenced to three years in prison. [OTSC ¶ 4; Appendix B]. When the respondent applied for a Pennsylvania non-resident producer license in 2013 he answered "No" to this question on the application: "Have you ever been convicted of a crime, had a judgment withheld or deferred, or are you currently charged with committing a crime?" [OTSC ¶ 5; Appendix C]. The respondent also answered "No" to a similar question on his application for licensure in Illinois, his home state. [OTSC ¶ 6 ; Appendix D].

On November 5, 2013 the Department issued a non-resident producer license to

the respondent based on the information supplied in his application. [*Id.*]. On March 13, 2015, The Illinois Department of Insurance issued a Stipulation and Consent Order to the respondent and fined him \$1,000.00 for his failure to report his criminal history on his application for a resident producer license. [OTSC ¶ 6; Appendix D]. On April 7, 2015 the respondent reported this administrative action to the Pennsylvania Insurance Department in compliance with the thirty-day reporting requirement found in 40 P.S. § 310.78(a). [OTSC ¶ 7].

In its OTSC the Department charged the respondent with three distinct violations of the Insurance Department Act: 1) providing misleading or false information in a license application in violation of 40 P.S. § 310.11(1); 2) committing a felony in violation of 40 P.S. § 310.11(14); and 3) demonstrating a lack of “general fitness, competence or reliability to satisfy the department that the licensee is worthy of licensure” in violation of 40 P.S. § 310.11(20).

For each of these three charges, the Commissioner has authority to impose remedial action against the respondent, including suspension or revocation of his certificate of qualification or license as well as imposing a penalty of up to \$5,000.00 per violation. 40 P.S. § 310.91. Prohibited acts are listed in 40 P.S. §§ 310.11. In the present case, the question is whether the undisputed facts warrant revocation of Marshall’s license and/or imposition of a civil penalty given his early history of personal criminal conduct which he failed to disclose when he sought licensure as an insurance producer in both Illinois and Pennsylvania.

PENALTIES

The Commissioner may suspend or revoke a license for conduct violating certain provisions of the Insurance Department Act, including those provisions violated by the respondent's conduct. 40 P.S. § 310.91. Each action violating a provision specified in section 310.11 subjects the actor to a maximum five thousand dollar civil penalty. 40 P.S. § 310.91(d)(2). A Commissioner is given broad discretion in imposing penalties. *Termini v. Department of Insurance*, 612 A.2d 1094 (Pa. Cmwlth. 1992); *Judson v. Insurance Department*, 665 A.2d at 523, 528 (Pa. Cmwlth. 1995).

Count II of the OTSC charges the respondent with commission of a felony in violation of 40. P.S. § 310.11(14). This charge results from the respondent's two guilty pleas and convictions of felonies in 1987 and 1992. These convictions for burglary and for unlawful use of a weapon by a felon, while serious, occurred more than twenty years before the respondent applied for an insurance producer license. Marshall has served his time and no evidence has been presented that he has participated in any criminal activity during the twenty-four years since his last conviction. No separate penalty will be imposed for this count.

Count I of the OTSC charges the respondent with violating the prohibition against providing incorrect or false information in a license application. 40 P.S. § 310.11(1). Marshall's decision to withhold information about his convictions on both his Illinois and Pennsylvania license applications goes to the heart of the requirement that insurance agents be trustworthy and reliable in their work with the insurance-buying public. If he is dishonest with the regulator, then the respondent cannot be entrusted with the welfare of individuals he purports to serve.

By definition, producers have extensive personal contact with applicants and insureds. The applicants and insureds entrust financial and personal matters to the producer, and rely upon the producer's integrity. The respondent has misled two regulators, thus casting doubt that he can be trusted to adequately advise insurance consumers. Simply put, at this time Marshall cannot be trusted with the pocketbooks, bank accounts and personal information of his customers. The respondent with this action has demonstrated that he is not currently worthy of holding an insurance producer license in Pennsylvania as alleged in count III of the OTSC.

Compounding the respondent's dishonesty is his failure to respond to the Department during the proceedings in this case. The respondent's clean record since his 1987 and 1992 criminal activities, his apparent cooperation with the Illinois regulator and his prompt disclosure of the Illinois administrative action may be considered mitigating factors. It is also noted that Illinois permitted the respondent to maintain his licensure as a resident insurance producer in that state. To the extent that these facts may be considered as mitigating factors, they are offset somewhat by the respondent's dishonesty with and unresponsiveness to the Pennsylvania Insurance Department.

The Department in its OTSC requests that the Insurance Commissioner revoke the respondent's insurance producer license(s), bar him from future licensure or from applying to renew any license previously held by the respondent in Pennsylvania, impose a civil penalty of \$5,000.00 per violation, order the respondent to cease and desist from violating the insurance laws of Pennsylvania and impose any other appropriate conditions, including supervision, for a minimum period of at least five years from the date of any future licensure.

In its motion for default judgment, the Department requests that the Insurance Commissioner enter a default judgment against the respondent, deem all relevant facts in

the OTSC as admitted, admit the authenticity of all documents attached to the OTSC, order the respondent to cease and desist from the activities alleged in the OTSC, revoke the respondent's insurance producer license(s), and impose a civil penalty of up to \$5,000 per violation and grant such other and further restitution and relief as may be deemed appropriate.

Considering the facts in this matter, the applicable law, the nature of the conduct and all aggravating and mitigating circumstances, penalties are imposed as set forth in the accompanying order.

CONCLUSIONS OF LAW

1. The Commissioner has jurisdiction over the parties and subject matter of these proceedings.

2. The Department may revoke or suspend a certificate or license upon finding that an agent or a broker has engaged in conduct which would disqualify him from initial issuance of a certificate or a license.

3. Unworthiness to hold a license may be established by a producer's failure to comply with the law which requires honest and complete answers to all questions on the license application.

4. If unworthiness is established, the Commissioner may exercise discretion to impose remedial action in light of the producer's conduct as well as mitigating and aggravating factors.

5. Producers on the front line dealing with the insurance-buying public must avoid conduct demonstrating a disregard for regulations which protect those consumers.

7. William Marshall by his conduct has violated the Insurance Department Act and has demonstrated current unworthiness to hold an insurance license.

8. If any of the foregoing Conclusions of Law should be held to constitute Findings of Fact, the ones so found are incorporated therein by reference.

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Respondent : Docket No. SC16-03-004

ORDER

AND NOW, based upon the foregoing findings of fact, discussion and conclusions of law, it is **ORDERED** as follows:

1. William Marshall shall **CEASE AND DESIST** from the prohibited conduct described in the adjudication.

2. All of the insurance licenses or certificates of qualification of William Marshall **ARE SUSPENDED** for a minimum of one (1) year pursuant to 40 P.S. 310.91 for each of Counts I, and III, with these revocations to run concurrently with each other for a total minimum period of one (1) year. Additionally, William Marshall is prohibited from applying for a certificate of qualification to act as a producer in this Commonwealth for a minimum of one (1) year. William Marshall is also prohibited from applying to renew any certificate of qualification previously held by him in this Commonwealth for a minimum of one (1) year.

3. William Marshall shall pay a civil penalty to the Commonwealth of Pennsylvania within thirty (30) days of this order as follows:

a. Count I: \$1,000.00

b. Count III: \$1,000.00

for a total of two thousand dollars (\$2,000.00). Payment shall be made by certified check or money order, payable to the Commonwealth of Pennsylvania, directed to: Administrative Assistant, Bureau of Licensing and Enforcement, 1227 Strawberry Square, Harrisburg, Pennsylvania 17120. In addition to the above restrictions, no certificate of qualification or other insurance license may be issued or renewed until the said civil penalty is paid in full.

4. This order is effective immediately.



TERESA D. MILLER
Insurance Commissioner